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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1949.

No. 215

CAMPBELL SOUP COMPANY AND CARNATION COMPANY,

Petitioners,

vs.

ARMOUR AND COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Campbell Soup Company and Carnation Company, plaintiffs in the District Court, appellants below, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review a judgment of that Court, entered on May 16, 1949.

The judgment here sought to be reviewed affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the respondent. The opinion of the Court of Appeals (reported in 81 U. S. P. Q. 430)[1] appears at page 48 of the record, (Respondent's Appendix) and is an appendix to this petition.

[1] Not yet reported in Fed. (2d).

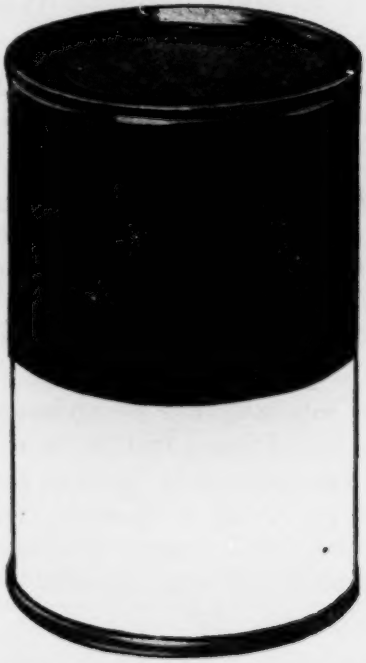
I.

Statement.

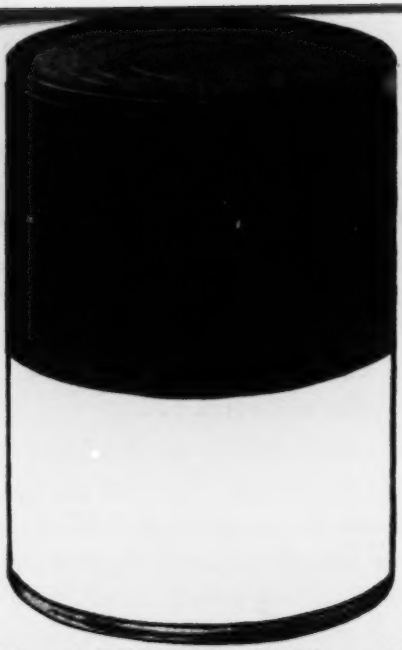
The proceeding in the District Court was a civil action to enjoin the use of a colorable imitation of a federally registered trade-mark and to enjoin unfair competition.

The action was brought by Campbell Soup Company, a New Jersey corporation, and Carnation Company, a Delaware corporation, the owners of a federally registered device trade-mark consisting of two parallel bands of approximately equal width, the upper one red and the lower one white, used on a large variety of food products,—the long familiar and widely advertised "Look for the Red and White Label" mark.

The registered red and white device trade-mark of the petitioners, is as follows:



As used by CAMPBELL (Petitioners' Exhibit 85)



As used by CARNATION (Petitioners' Ex. 82)

Respondent's mark, the use of which petitioners seek to enjoin, follows:

As used by ARMOUR (Petitioners' Ex. 81)

Each of the petitioners has used the red and white device trade mark for more than half a century. Respondent commenced the use of the challenged device in 1946.

The devices of petitioners and of respondent involved in the case at bar are used on canned food products, and, in fact, respondent or its subsidiaries use the challenged device on certain identical products: pork and beans, tomato juice and soup.

The District Court held for the defendant (the respondent here) on the trade-mark aspect of the case principally on the ground that the red and white device could not lawfully be used by both of the plaintiffs, and that the red and white device was a "mere tasty dress," not constituting a trade-mark. It held for the defendant on the unfair competition aspect on the ground that "no intelligent purchaser using reasonable care would be confused."

The Court of Appeals treated as a principal problem the question whether federal or state law applied—a question that neither party raised or argued. It paid no attention to the propriety of the use of the red and white device by both of the petitioners; it held that the petitioners could not have the exclusive right to the trade-mark of a red and white device consisting of two parallel bands one red and one white. On the unfair competition aspect of the case, it merely adopted the conclusion and rule of the District Court that "no intelligent purchaser using reasonable care would be confused."

The result of the decision by the Court of Appeals on the trade-mark question conflicts with results arrived at by other Courts of Appeals, which brings more confusion into an important field in which much confusion already exists.

On the issue of unfair competition, the Court of Appeals in adopting the test below of the "intelligent purchaser using reasonable care" is in conflict with the decisions of other Courts of Appeals, as well as with the test laid down by this Court in analogous cases, and presents a question of great public importance in its departure from the established standard of protection of trade-mark owners and the consuming public.

II.

Jurisdiction.

(a) The jurisdiction of this Court is based upon 28 U. S. Code § 1254 (1); Act of June 25, 1948, C. 646; 62 Stat. —.

(b) The issue involves the construction of the Trade-Mark Act of 1905 (15 U. S. C. A. Sections 81-128) and the Act of 1946 (15 U. S. C. A. Sections 1051-1127).

III.

The Questions Presented.

1. Is the red and white device used and registered by petitioners a trade-mark entitled to the protection accorded to trade-marks legally registered under the Trade-Mark Act of 1905?

2. Is respondent's challenged mark, when applied by respondent to food products, likely to cause confusion or mistake or deceive purchasers as to the source of origin of such goods within the meaning of the Trade-Mark Act of 1946?

3. Did the Courts below adopt the correct legal principle in using as a test of unfair competition the "intelligent purchaser using reasonable care?"

IV.

Reasons for the Allowance of the Writ.

The decision of the Court of Appeals below raises questions of public importance since it is in conflict with the decisions of other Courts of Appeals, and is in conflict with the rule established by this Court in analogous circumstances, in the following respects:

1. The decision of the Court of Appeals with respect to the use of color in a trade-mark increases the doubts and uncertainties in a field that is already confused. Color-design has been long and increasingly used as a distinctive feature to identify products for the benefit and protection of the public. It is of vital importance to the protection of the public, as well as to the owners of trade-marks, to determine the lawful scope of the use of color in trade-marks. Over the years there has been a huge volume of commercial advertising publicizing color-design as a means of product identification. These petitioners have spent many millions of dollars over a long period of time in advertising the red and white device trade-mark. The advertising not only displayed the red and white device but also included the slogan "Look for the Red and White Label". The general public, which purchases and relies on the source of origin of products so identified, should be afforded all reasonable protection against confusion.

2. The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals wherein color devices, which were no more distinctive and arbitrary than petitioners', were held to be valid trade-marks and entitled to protection against infringement. Some of these cases are:

Mishawaka Rubber and Woolen Manufacturing Co. v. *S. S. Kresge Co.*, 119 Fed. (2d) 316 (C. C. A. 6th), *rev'd* on other grounds 316 U. S. 203. Plaintiff's mark, consisting merely of a red disc, as follows:

was held to be infringed by defendant's mark, consisting of red discs, as illustrated here:

G. H. Mumm Champagne v. *Eastern Wine Corp.*, 142 Fed. (2d) 499 (C. C. A. 2nd). Plaintiff's device trademark, consisting of a red band displayed diagonally across a white background, as illustrated below:

was held to be infringed by the following mark of defendant:

Ohio Baking Co. v. *National Biscuit Co.*, 127 Fed. 116 (C. C. A. 6th). Plaintiff's red label:

was held to be infringed by defendant's red label as here illustrated:

Bass, Ratcliff & Gretton v. *Christian Feigenspan*, 96 Fed. 206 (C. C. N. J.). Plaintiff's trade-mark, consisting of a red triangle, as follows:

was held to be infringed by defendant's mark, consisting of a red triangle, as illustrated below:

3. The Court of Appeals in using the test of the "intelligent purchaser using reasonable care" in the determination of unfair competition is in direct conflict, on a matter of public importance, with numerous decisions of other Courts of Appeals, such as:

Florence Mfg. Company v. *J. C. Dowd & Co.*, 178 Fed. 73 (C. C. A. 2d), holding at page 75:

> "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions * * *."

Stork Restaurant v. *Sahati*, 166 Fed. (2d) 348 (C. C. A. 9th), 359:

> "It may well be true that a prudent and worldly-wise passerby would not be so deceived. The law, however, protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the ignorant, the inexperienced, and the gullible.
>
> "That is the teaching of the Supreme Court of the United States, and it has been followed in this and in other circuits."

De Voe Snuff Co. v. *Wolff*, 206 Fed. 420 (C. C. A. 6th), 423-424:

> "It may be true that the cautious and discriminating purchaser is not likely to be so misled; but the protection accorded to a trade-mark is not limited to the cautious and discriminating customer, but embraces the 'ordinary' or 'unwary' purchaser as well. • • •"

Bass, Ratcliff & Gretton v. *Christian Feigenspan*, 96 Fed. 206 (C. C. D. N. J.), at 210:

> "When the symbols of the complainant and defendant are viewed side by side differences between them can, of course, be perceived, which may or may not be sufficient in their character to prevent confusion on the part of purchasers who have both symbols before them at the same time. But purchasers of pale ale do not as a rule have both symbols simultaneously before them for comparison. If they have come to associate a red triangle as applied to pale ale with Bass pale ale,—not necessarily with the name 'Bass' in connection with pale ale, but with the superior malt liquor which Bass pale ale is,—and thereafter see the red triangle of the defendant's symbol applied to pale ale or substantially similar malt liquor, the complainant's symbol not being at the time before their eyes, may they not, in the exercise of only such degree of care as is usually observed by and reasonably to be ex-

> pected from such purchasers, under varying conditions of knowledge, intelligence and nationality, be misled or deceived into the belief that in buying the malt liquor bearing the defendant's symbol they are getting Bass pale ale? Clearly they may; * * *."

The application of the "intelligent purchaser, using reasonable care" test adopted by the Courts below would be a retrogression in any situation. Its offense, however, is gravest when considered against the background of this case which involves staple articles of food purchased at a low price,—for as little as ten cents,—in hurried transactions in self-service stores and super markets not just by the "intelligent purchaser" but by the unintelligent, unwary and inattentive purchaser as well.

It is a matter of highest public importance that this Court correct the backward step taken by the Court of Appeals for the Third Circuit in this case and announce a proper standard more sympathetic to, and designed to benefit and protect, all strata of the general public.

4. The test used by the lower Courts is also inconsistent with the principle announced by this Court in the Federal Trade Commission cases:

> "Laws are made to protect the trusting as well as the suspicious." (*Trade Comm'n* v. *Education Society*, 302 U. S. 112, 116.)

This principle has been regularly applied by the other Federal Courts. *Federal Trade Commission* v. *Balme*, 23 Fed. (2d) 615, 620 (C. C. A. 2d); *Charles of the Ritz Dist. Corp.* v. *Federal Trade Comm'n*, 143 Fed. (2d) 676, 679 (C. C. A. 2d); *Gulf Oil Corporation* v. *Federal Trade Commission*, 150 Fed. (2d) 106, 109 (C. C. A. 5th).

Conclusion.

As stated by this Court in *Mishawaka Mfg. Co.* v. *Kresge Co.*, 316 U. S. 203, at 205:

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress. * * *."

It is of the utmost importance that this Court review the decision below of the Court of Appeals, and thereby,—for the protection of the general public and the holders of registered trade-marks,—delineate the validity as trade-marks of color-design devices, such as that of the petitioners, which are widely known to and relied upon by the general public; determine the proper standard by which to judge whether the use of a challenged mark on goods is "likely to cause confusion or mistake or to deceive purchasers as to the source of origin" of such goods within the meaning of the Trade Mark Act of July 5, 1946; and establish whether the laws of unfair competition are designed merely to protect the "intelligent purchaser" or to afford benefit and protection to the public as a whole,—the unwary and the gullible as well as the clever and intelligent.

WHEREFORE, YOUR PETITIONERS PRAY THAT a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Court in the case numbered and entitled on its docket Number 9813, *Campbell Soup Company and Carnation Company, Plaintiffs-Appellants* v. *Armour and Company, Defendant-Appellee,* to the end that this case may be reviewed and determined by this Court; that the judgment of said Court of Appeals for the Third Circuit be reversed; and that petitioners be granted such other and further relief as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions Below.

The United States Court of Appeals for the Third Circuit entered judgment in this action on May 16, 1949. The opinion is reported in 81 U. S. P. Q. 430, and appears as an appendix to the petition. The opinion of the District Court is reported in 81 Fed. Supp. 114.

II.

Jurisdiction.

The petition sets forth at page 5 the grounds upon which the jurisdiction of this Court is invoked.

III.

Statement of the Case.

The petition sets forth, beginning at page 2, a statement of the case, and, beginning at page 5, the questions presented.

IV.

Specification of Errors.

The petition sets forth the errors relied upon, beginning at page 5 ("Questions Presented"), and beginning at page 6 ("Reasons for the Allowance of the Writ").

V.

Argument.

1. The Court of Appeals Erred in Invalidating Petitioners' Registered Device Trade-Mark and in Denying Them the Statutory Remedy for Its Infringement.

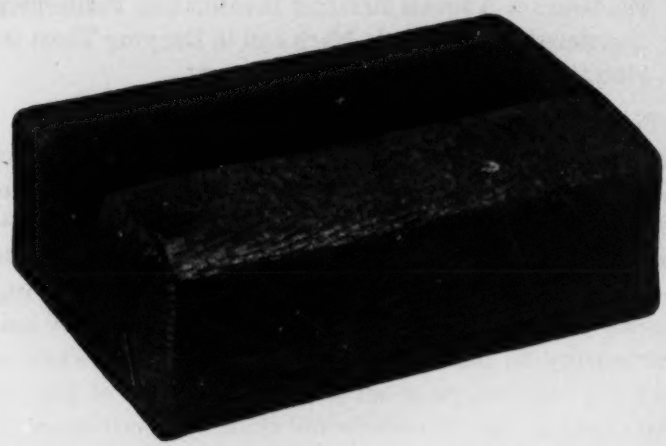
The Court of Appeals held that the mere division of a device into background colors is not distinctive or arbitrary. Contrary to the mistaken views of the Court of Appeals petitioners do not claim any exclusive rights to use of the colors red and white,—they claim only the right to use red and white as used in the distinctive device registered by them and used by them for approximately one-half century to identify their goods. Red and white as used, for example, on a barber pole or a stick of peppermint candy is clearly outside the claims of petitioners.

The Court of Appeals disregarded the fact that a device can be a trade-mark the same as a word or name. Section 45 of the Trade-Mark Act of July 5, 1946 (15 U. S. C. A. § 1127) defines a trade-mark as follows:

> "The term 'trade-mark' includes any word, name, *symbol* or *device* or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." (Emphasis ours.)

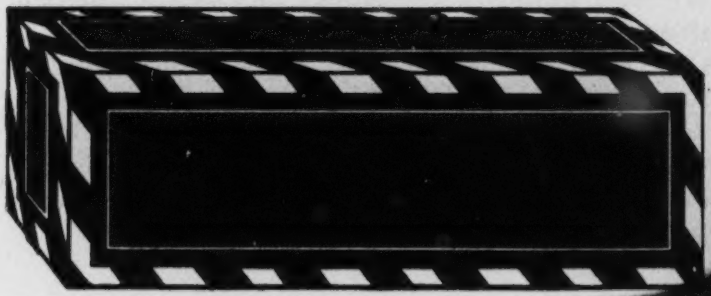
The owners of trade-marks with increasing frequency have been employing color-design to obtain a "cogenial symbol" to impregnate the atmosphere of the market and reach the minds and memories of their customers and potential customers. To illustrate, there appear in the Record (Petitioners' Exhibits Nos. 128-149) some twenty odd trade-mark registrations of bands or panel designs in one or more colors that have been granted by the Patent Office.

One of the most familiar color-designs is Petitioners' Exhibit No. 133, the registration by the makers of Palmolive soap of a horizontal black band across a green background, as follows:



This color-design device has become and is just as valid a trade-mark as the word mark "Palmolive". Dr. Nixon, of Columbia University, found in his package identification surveys that 93.8% of all persons interviewed properly identified a package of Palmolive soap, as "Palmolive" with the name removed (Pets.' App. 495a).

Another illustration of a valid device trade-mark is illustrated by Petitioners' Exhibit No. 136, the registered trade-mark of The Barbasol Company which consists of red, white and blue diagonal stripes as follows:



Counsel do not believe that the validity of the Palmolive mark has ever been questioned; but the validity of the Barbasol mark was recently sustained by the Court of Appeals for the Seventh Circuit in *Barbasol* v. *Jacobs,* 160 Fed. (2d) 336. Reference is also made to the cases cited in the petition, at pages 7-11, which sustained and protected color-design trade-marks.

Petitioners adopted their red and white device before the turn of the century, and have been outstandingly successful in obtaining its recognition and acceptance by the public. The Record is replete with evidence, including numerous surveys, which establish that petitioners' red and white device is the means by which the public identifies petitioners' products.* Such being the case, this device is a valid trade-mark both at common law and under the statute,** and is entitled to protection.

Furthermore, the holding of the Court of Appeals that petitioners' device is not properly registerable as a trade-mark is in direct contradiction to the rulings of the Patent Office, which has granted registration not only to the petitioners but also to countless others for trade-marks consisting of color-designs, such as panels, bands or striped designs. (See, *e. g.*, Petitioners' Exhibits Nos. 128-149.) This administrative construction by the Patent Of-

* Pets.' App. 602A, 611A, 449A, 450A, 452A, 451A, 607A, 495A, 588A, 590A, 592A, 594A, 597A.

** Section 32(1) of the Trade-Mark Act of July 5, 1946 (15 U. S. C. A. 1114(1)) provides:

"(1) Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; * * * shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, * * *."

fice of the trade-mark statutes is entitled to great weight for, as this Court has consistently ruled, the interpretation placed upon a statute by those having responsibility for administering it is presumptively correct, and such interpretation will be granted substantial recognition by the courts. (See, *e. g.*, *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315.)

As the authorities now stand, we find that the Patent Office is regularly registering trade-marks for color-design devices, and that many of them have been sustained by the courts. It is a common, every-day experience to identify a commodity by the recognition of the color device appearing on it. The Court below has exploded a bombshell in trade-mark law by invalidating one of the oldest and best-known device trade-marks for commodities in use in this country. The decision has brought doubt and confusion in the law, created uncertainty in the minds of business men as to the validity of their trade-marks. It has denied the general public the benefit and protection afforded by identification devices by which they identify products of every day purchase.

2. The Courts Below Adopted an Incorrect Legal Principle in Deciding the Issue of Unfair Competition.

The District Court made the finding of fact that (No. 36, Pets.' App. 1176A): "No intelligent purchaser, using reasonable care, would be confused as between the goods of either plaintiff". It then arrived at the conclusion of law that: "The defendant has not been guilty of unfair competition either in the United States or abroad" (Pets.' App. 1177A).

The Court of Appeals said:

> "The Trial Judge found as a matter of fact that 'no intelligent purchaser, using reasonable care, would

> be confused as between the goods of either plaintiff.' There was considerable evidence on this point of confusion and the Record is full of reports of a series of tests conducted in different retail stores. We are satisfied with the fact conclusion of the Trial Judge on this point." (Res. App. 54.)

Thus, there can be no doubt that the legal standard of unfair competition applied by the lower Courts was that of the "intelligent purchaser, using reasonable care". But for many years other courts have applied a different standard,—one which is more sympathetic to, and designed to protect, all strata of the general public.

As long ago as 1893, Judge Benedict, in *Von Mumm* v. *Frash*, 56 Fed. 830, 839 (C. C. E. D. N. Y.), another unfair competition case, said:

> "As I understand it, the law is intended for the protection of the ignorant, the weak and the unwary. The sharp and the shrewd take care of themselves without aid from the courts."

This standard has been recognized in the unfair competition cases cited at pages 11-13 of the petition. The correct rule was set forth in the Second Circuit in *Florence Mfg. Co.* v. *Dowd*, 178 Fed. 73, that we must look to the protection of "that vast multitude which includes the ignorant, the unthinking and the credulous, who in making purchases do not stop to analyze but are governed by appearances and general impressions"; and the decision of the Ninth Circuit in the *Stork Club* case (*Stork Restaurant* v. *Sahati*, 166 Fed. (2d) 348) that: "The law, however, protects not only the intelligent, the experienced and the astute, but safeguards from deception also the ignorant, the inexperienced and the gullible."

It would be a work of supererogation to discuss the line of authorities which has announced and applied that stand-

ard and which appeared to be unbroken in recent years until the announcement of the Courts below in this case.

This development in the law of unfair competition has paralleled the law in the closely analogous cases brought by the Federal Trade Commission for the protection of the public. There this Court has set the standard high with the rule:

> "Laws are made to protect the trusting as well as the suspicious." (*Trade Comm'n* v. *Education Society*, 302 U. S. 112, 116.)

If ever there was a situation in which this beneficial philosophy of the law should be applied, it is the one in the case at bar. As stated in *Hi-Land Dairymen's Ass'n* v. *Cloverleaf Dairy*, 107 Utah 68, 75:

> "One ordinarily does not give the same degree of attention to the purchase of small, inexpensive articles as to larger and more expensive articles, or ones which are purchased less frequently. * * * Selections are often made hurriedly and upon general impressions as to size, color and location of the desired product. For, as one customer put it, 'I don't go to a grocery store to read'."

A can of soup, or a can of evaporated milk, sells for as little as ten cents. They are sold largely in self-service stores and are purchased in rapid transactions in a routine way. These products are recognized by the appearance of the can. These staple articles of food at this low price are bought not just by the "intelligent purchaser" but by the foreigner who has little or no knowledge of English, the child on an errand, the harried housewife, the shopper with imperfect vision who can identify a color device but not a name without glasses, and the purchaser with less than normal intelligence or more than average credulity. Again, these commodities are sold to a very large extent in self-service stores, and in super-markets,

where cans are hurriedly picked from shelves and counters, or from bins. That is the background we find in this case. The shopping practice is quite different now from the old days when such articles were called for by brand names. In those days device trade-marks did not play a very important part in shoppers' habits.

The decision of the Court of Appeals in holding that petitioners' device is not a trade-mark and in applying the "intelligent purchaser" test is out of harmony with the evolution and development of the law for the prevention of trade-mark infringement and unfair competition and for the protection of the public against fraud and deception. It is a definite retrogression and offends common sense and justice.

Conclusion.

For the reasons above set forth it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 9813

CAMPBELL SOUP COMPANY AND CARNATION COMPANY,
Appellants,

vs.

ARMOUR AND COMPANY.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued April 4, 1949.
Before MARIS, GOODRICH and KALODNER, *Circuit Judge.*

OPINION OF THE COURT.
(Filed May 16, 1949.)

By GOODRICH, *Circuit Judge.*

Campbell Soup Company and Carnation Company joined as plaintiffs against Armour and Company. They sought an injunction to stop the use by Armour of a red and white label used on some of its food products; likewise, an accounting. The District Court denied relief and the plaintiffs appeal.

The most difficult point in the case is the determination whether federal or state law is to be applied. The parties

did not argue this question, perhaps because they did not know what to say. We take it up, not because we are in doubt what to do in this particular litigation, but to record the fact that we are conscious of the problem.

A case which involves trademark infringement only, without reference to the federal statute, is governed by state law. *Anheuser-Busch, Inc.* v. *DuBois Brewing Co.*, ... F. 2d..... (C. C. A. 3, May 12, 1949). This is perfectly logical, for trademark infringement is but one phase of the general subject of unfair competition. As to this subject, too, state law governs. *Pecheur Lozenge Co., Inc.* v. *National Candy Co., Inc.*, 315 U. S. 666 (1942). Whether in such a situation the state conflict of laws rule will depart from the general rule of reference to the place of wrong, because of the complications involved in such reference in a multi-state tort, remains to be seen.[1] The rule is clear enough, although the application of it may get bewilderingly complicated.

By contrast, patent litigation is a matter for federal statutes and federal decisions only. There is no common law right of monopoly, and the limited monopoly under the federal patent system is both created and controlled by federal law exclusively. Likewise, where there is a constitutional grant of power to federal courts, as in admiralty and bankruptcy cases, no one seriously doubts that federal courts follow their own course of decision and are not in any way limited by state law.

The situation we have in this case lies between these two clearly settled areas. Here we have a claim for unfair competition generally and also a claim for trademark infringement with reliance upon the federal statute as to registration.[2] The unfair competition matter is, as said above,

1. Compare *National Fruit Product Co.* v. *Dwinell-Wright Co.*, 47 F. Supp. 499 (D. C. D. Mass. 1942) with *Hartmann* v. *Time, Inc.*, 166 F. 2d 127 (C. C. A. 3, 1948). See Note, 60 Harv. L. Rev. 1314 (1947).

2. Federal Trade Mark Act of 1905, 15 U. S. C. A. § 81 *et seq.*, now replaced by the Lanham Act of 1946, 15 U. S. C. A. § 1051 *et seq.*

one for state law.[3] What about the trademark infringement in this instance? The trademark registration statute expressly confers jurisdiction on federal courts for litigation arising under it.[4] But, on the other hand, federal registration does not create a trade-mark.[5] The trademark comes from use, not registration, and the right to it is in the nature of a property right based on common law.[6] When we have an express grant of jurisdiction to federal courts to hear and determine a matter which is essentially one of state property law, to which precedents do we turn, federal or state? Federal courts have, in general, cited and followed their own decisions without, seemingly, being worried about the choice of law to be made in this instance.[7] Perhaps that is because federal courts established a good

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3. On the confusion which may arise when infringement is treated as a federal question and an unfair competition count is pendent to the infringement count, compare *National Fruit Product Co.* v. *Dwinnell-Wright Co.*, 47 F. Supp. 499 (D. C. D. Mass. 1942) with *Bulova Watch Co.* v. *Stolzberg*, 69 F. Supp. 543 (D. C. D. Mass. 1947).

4. 15 U. S. C. A. § 97, now replaced by 15 U. S. C. A. § 1121; 28 U. S. C. A. § 41, now Rev. Tit. 28 U. S. C. A. § 1338.

5. Registration under the 1905 statute is prima facie evidence of ownership of the trademark. The Lanham Act of 1946 accords certain other advantages to the registrant, *e. g.*, prima facie validity. 15 U. S. C. A. § 1057 (b). See 2 Nims, Unfair Competition and Trade-Marks § 223a (4th ed. 1947).

6. "• • • in the United States the exclusive right to the use of a trademark has always rested and still rests on the common law." 1 Nims, Unfair Competition and Trade-Marks § 185, p. 511 (4th ed. 1947). A trademark is "property" in the sense that it is part of the business good will which it symbolizes. See 1 Nims, *supra* § 198a.

7. In *Pechcur Lozenge Co., Inc.* v. *National Candy Co., Inc.*, 315 U. S. 666 (1942) the Supreme Court granted certiorari because it thought the issue of the applicable law in infringement suits was raised in the case. As it turned out, the issue was not raised. However, in *Mishawaka Rubber & Woolen Co.* v. *S. S. Kresge Co.*, 119 F. 2d 316 (C. C. A. 6, 1941), rev'd as to measure of damages only, 316 U. S. 203 (1942), the question of validity of a registered trademark was treated as a matter of federal law. The Courts of Appeals which have passed upon this question have applied federal law. *Dwinell-Wright Co.* v. *National Fruit Product Co.*, 140 F. 2d 618 (C. C. A. 1, 1944); *Time, Inc.* v. *Viobin Corp.*, 128 F. 2d 860 (C. C. A. 7, 1942), cert. denied 317 U. S. 673 (1942); *Philco Corp.* v. *Phillips Mfg. Co.*, 133 F. 2d 663 (C. C. A. 7, 1943). The case for applying federal law in this field is fully and persuasively stated in *Zlinkoff, Erie* v. *Tompkins*: In Relation to the Law of Trade-Marks and Unfair Competition, 42 Col. L. Rev. 955 (1942). See also Note, 60 Harv. L. Rev. 1315 (1947), recommending legislation to make the substantive question a federal one under the commerce power.

sized body of precedent in this field prior to 1938 and we have all been just a little bit slow to realize the full impact of *Erie Railroad* v. *Tompkins*.[8]

We have stated the problem. Fortunately, this litigation does not drive us into a corner where we must solve it in order to settle the case. The points on which we make our determination are not, we think, subject to serious dispute. We find no difference between state and federal decisions and we are not, therefore, driven to the microscopic examination of state decisions for the last dictum which will assist us to find and apply state law.

It is worth the space involved to call attention to just what it is the plaintiffs claim. Their suit here is based solely upon their claimed exclusive right to the use of red and white in packaging their food products. While their registration describes the red over white as a rectangular design, when the colors appear on their packages they appear in the form of an endless band which runs around the entire container. The Campbell red is not the same as the Carnation red. Indeed, the Carnation red is not the same on all of its products, according to the sample labels offered in the plaintiffs' exhibits. The red used by Armour is a specially blended color. The usual Armour label is white over red instead of red over white, as the plaintiffs use the colors, but in some cases Armour uses the red and white bands vertically.

What the plaintiffs are really asking for, then, is a right to the exclusive use of labels which are half red and half white for food products. If they may thus monopolize red in all of its shades the next manufacturer may monopolize orange in all its shades and the next yellow in the same way. Obviously, the list of colors will soon run out.

That a man cannot acquire a trademark by color alone

8. 304 U. S. 64 (1938).

has been stated a good many times in decisions and textbooks.[9]

The rule is well stated in *James Heddon's Sons* v. *Millsite Steel & Wire Works*, 128 F. 2d 6, 9 (C. C. A. 6, 1942):

> "Color, except in connection with some definite arbitrary symbol or in association with some characteristics which serve to distinguish the article as made or sold by a particular person is not subject to trademark monopoly."

In *Diamond Match Co.* v. *Saginaw Match Co.*, 142 Fed. 727, 729 (C. C. A. 6, 1906), the following language appears which is particularly appropriate here:

> "Sometimes a color, taken in connection with other characteristics, may serve to distinguish one's goods, and thus be protected by the courts * * *; but, as a rule, a color cannot be monopolized to distinguish a product * * *.
>
> "The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest."

And in an earlier suit by Carnation's predecessor, the Washington Supreme Court said, *Pacific Coast Condensed Milk Co.* v. *Frye & Co.*, 85 Wash. 133, 147 Pac. 865, 869 (1915):

> "The primary colors are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress."

Plaintiffs cite to us a number of cases, however, in which various color combinations as trademarks have been

9. See, *e. g.*, *Leschen Rope Co.* v. *Broderick*, 201 U. S. 166 (1906); *Samson Cordage Works* v. *Puritan Cordage Mills*, 211 Fed. 603 (C. C. A. 6, 1914); *James Heddon's Sons* v. *Millsite Steel & Wire Works*, 128 F. 2d 6 (C. C. A. 6, 1942); 1 Nims, Unfair Competition and Trade-Marks § 210b; 2 Callmann, Unfair Competition and Trade Marks § 71.5 (1945).

upheld.[10] Here, too, the law is well settled. Color is a perfectly satisfactory element of a trademark if it is used in combination with a design in the form, for example, of a picture or a geometrical figure. The Barbasol case is typical.[11] Here was a package using several colors but in a distinct and arbitrary design. The mere division of a label into two background colors, as in this case, is not, however, distinct or arbitrary, and the District Court so found.

When we say that plaintiffs cannot have exclusive right to a trademark of a red and white label, we are by no means denying their right to acquire a trademark when the color is combined with other things in a distinctive design. As a matter of fact, the distinctiveness of plaintiffs' packages does not depend upon color alone, although each has been granted registration of a trademark described in terms of color. Each has its name in one of the color bands in a uniform and specified type of script. Each has a very distinctive design on its label. Carnation has a small bouquet

10. Those relied upon most heavily are: *Barbasol Co.* v. *Jacobs*, 160 F. 2d 336 (C. C. A. 7, 1947); *Mumm Champagne* v. *Eastern Wine Corp.*, 142 F. 2d 499 (C. C. A. 2, 1944), cert. denied 323 U. S. 715 (1944); *Winthrop Chemical Co.* v. *American Pharmaceutical Co.*, 94 F. 2d 587 (C. C. A. 2, 1938); *Straus* v. *Notaseme Hosiery Co.*, 240 U. S. 179 (1916); *O'Connell* v. *National Water Co.*, 161 Fed. 545 (C. C. A. 3, 1908); *Ohio Baking Co.* v. *National Biscuit Co.*, 127 Fed. 116 (C. C. A. 6, 1904), cert. denied 195 U. S. 630 (1904); *Bass, Ratcliff and Gretton, Ltd.* v. *Feigenspan*, 96 Fed. 206 (C. C. N. J. 1899). Each illustrates on its facts the importance of a distinct and arbitrary design which includes color in its total effect. Color is only one element in the similarity of the marks held to have infringed.

11. *Barbasol Co.* v. *Jacobs*, 160 F. 2d 336 (C. C. A. 7, 1947). The *Barbasol* case, *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 119 F. 2d 316 (C. C. A. 6, 1941), rev'd as to measure of damages only, 316 U. S. 203 (1942), and *Pro-phy-lac-tic Brush Co.* v. *Abraham & Straus, Inc.*, 11 F. Supp. 660 (D. C. E. D. N. Y. 1935), give the broadest support to color designs as trademarks which we found in the cases. All are distinguishable. In the *Barbasol* case, the color design was distinct and arbitrary. In the *Mishawaka* case, the dispute concerned a rubber heel whose distinguishing feature was a red dot. The registrant was protected against other manufacturers who used the red dot on heels. The few ways in which one rubber heel may be marked to distinguish it from another, and the obvious similarity in overall appearance of the products there in question distinguish that case from this. The *Pro-phy-lac-tic* case involved in copying of the plaintiff's yellow container and the word "Pro-phy-lac-tic" in the same red script. The combined effect of color, design and wording in that case is apparent, and distinguishes it from the present case.

of carnation flowers. Campbell has a medallion of individual design. Armour, too, does not depend upon color alone. It uses different colors with different products and each has the Armour name in an individual type of script accompanied by the star which it says has been the mark of its goods over many years. In denying the plaintiffs the exclusive use of color alone we are not passing upon the question whether they have acquired trademarks entitled to protection in the sum total of the combinations which make up their respective labels for their goods.

Finally, there was no unfair competition. Certainly there was not the slightest evidence that Armour passed off its goods as those of the plaintiffs. The Trial Judge found as a matter of fact that "no intelligent purchaser using reasonable care would be confused as between the goods of either plaintiff:" [12] There was considerable evidence on this point of confusion and the record is full of reports of a series of tests conducted in different retail stores. We are satisfied with the fact conclusion of the Trial Judge on this point.

A number of other points have been raised in the presentation of this appeal. We do not deem it necessary to go into them and our failure to do so is not an indication that we disagree with the District Court upon them. We think that what is said above is sufficient to show that the decision below was correct.

The judgment of the District Court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

12. In this he was fully within the rule as laid down in *Strochmann Bros. Co.* v. *Manbeck Baking Co.*, 331 Pa. 96, 200 Atl. 97 (1938).